



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: FOO - 203718

PRELIMINARY RECITALS

Pursuant to a petition filed on November 12, 2021, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Marinette County Department of Human Services regarding FoodShare benefits (FS), a hearing was held on February 2, 2022, by telephone. Hearings scheduled in December, 2021 and January 2022, were rescheduled at petitioner's request.

The issue for determination is whether the agency correctly terminated petitioner's daughter's FS enrollment following its determination that petitioner no longer had primary physical placement of her child.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [REDACTED]
Marinette County Department of Human Services
Wisconsin Job Center Suite B
1605 University Drive
Marinette, WI 54143

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Marinette County.
2. Petitioner received FS benefits as a 5-person household, which included her minor child, SC. A household member was subsequently removed from the FS household effective October 1, 2021, due to incarceration.
3. At some point in 2021, petitioner planned to relocate to Green Bay. In preparation for the move, petitioner and SC's father, JC, signed a Stipulation and Order Amending Judgment, which indicated that, effective September 1, 2021, JC would have primary placement of SC. Exhibit R-6.
4. On August 23, 2021, the respondent received an email from the child support agency indicating that SC's primary placement had changed. The respondent pended petitioner's FS case, and requested verification of SC's living situation. Exhibit R-9.
5. Verification was not timely received, and the respondent issued written notice to petitioner that SC's FS enrollment would close. Exhibit R-10.
6. On September 14, 2021, petitioner contacted the respondent to question why her FS benefits were ending. Petitioner indicated at that time that her relocation plans had changed, and that SC's placement remained unchanged. The next day petitioner provided a portion of the Stipulation and Order Amending Judgment, which referenced 50/50 placement of SC.
7. Based upon petitioner's submission of the Stipulation and Order Amending Judgment excerpt, petitioner's FS was continued.
8. On September 28, 2021, the respondent obtained a copy of the full Stipulation and Order Amending Judgment, which specified that JC would have primary physical placement of SC effective September 1, 2021.
9. Subsequently, the respondent spoke with petitioner and advised her to obtain a statement from JC to confirm her position that she retained primary physical placement of SC.
10. A representative of the respondent contacted JC in September and November; JC indicated that he did not want to get involved, and did not provide any placement information corroborating or contradicting petitioner's claim.
11. On September 30, 2021, the respondent issued an About Your Benefits letter to petitioner indicating that, effective November 1, 2021, SC would no longer be receiving FS benefits on petitioner's case. Exhibit R-12.
12. Petitioner filed a Request for Fair Hearing with the Division of Hearings and Appeals on November 12, 2021.

DISCUSSION

FoodShare regulations hold that a household is composed of a "group of individuals who live together and customarily purchase food and prepare meals together for home consumption." 7 C.F.R. § 273.1(a). The following individuals who live together must be included as part of the same household for determining FS groups: spouses; persons under age 22 living with their natural or adoptive parents or stepparents; and a child under age 18 living with and under parental control of a household member other than their parent. 7 C.F.R. § 273.1(b). The only other relevant instruction offered by the federal regulation allows state agencies to create policies that answer questions relevant to household composition:

For situations that are not clearly addressed by the provisions of paragraphs (a) and (b) of this section, the State agency may apply its own policy for determining when an

individual is a separate household or a member of another household if the policy is applied fairly, equitably and consistently throughout the State.

7 C.F.R. §273.1(c).

Wisconsin's policy is that children are included in the food unit with their primary caretaker, with whom they reside. If the residence of a child is questionable, court documents can be used to determine if there is a primary caretaker designated. FoodShare Wisconsin Handbook (FSH) § 3.2.1.1. In this case, it is undisputed that September 2, 2021 court order regarding placement of SC indicates that JC shall have primary physical placement of SC effective September 1, 2021.

Petitioner asserts that she and JC had shared custody and placement of SC historically, that her plans to move to Green Bay never materialized, and as such SC's placement has never changed. If the parents have equally shared placement and one parent is not designated primary caretaker, the parents can be asked to decide. If the parents cannot or will not decide, the agency may compare the parents' activities and responsibilities regarding 15 enumerated factors to determine whether one exercises more control than the other. *Id.* That policy specifically provides:

... Children are included in the food unit of their primary caretaker, with whom they live.

There may be situations when the living arrangement of a child is not easily determined. There are many methods that can be used to determine where the child is living.

If the living arrangement of a child is questionable, court documents can be used to determine if there is a primary caretaker designated. If the living arrangement is a 50-50 joint placement, and one parent is not designated as the primary caretaker, the parents can be asked to decide.

Note: A person can be in more than one food unit, but may only receive benefits in one FoodShare **assistance group** at a time. A person cannot be a member of more than one FoodShare assistance group in the same month. (3.3.1 Food Unit/Assistance group/Relationships) (3.4.1 Dual Membership and Duplicate Benefits).

If the parents cannot or will not decide, compare the parents' activities and responsibilities against the following list and determine which one is exercising more control than the other:

1. If the parents live in different school districts, where does the child attend school? Who selected the school?
2. Who assists the child with homework or school-related tasks?
3. Are there tuition costs for the child's education? If so, who pays those costs?
4. If the child is enrolled in day care, who arranges for and pays these costs?
5. Who is responsible for taking the child to and from school and/or day care?
6. Which parent is listed as the contact for emergencies at the child's school or day care provider?
7. Who arranges medical and dental care for the child? Who selects the physician and dentist?
8. Who maintains the child's medical records?
9. Who initiates decisions regarding the child's future?
10. Who responds to medical or law enforcement emergencies involving the child?

11. Who spends money on food or clothing for the child when the child visits the absent parent?
12. Who disciplines the child?
13. Who plays with the child and arranges for entertainment?
14. Are more of the child's toys, clothing, etc. kept at one parent's home than the other's?
15. In which household do the children receive the majority of their meals?

Only one parent can receive FoodShare for a child. If you still cannot determine which assistance group the child should be in, the child should be included in the assistance group of the parent who first applied. Use the best information available to make your decision, and document in case comments the basis of your determination. ...

FSH § 3.2.1.1.

At hearing, the agency representative testified that it had not reviewed the questions listed in FSHB 3.2.1.1 to determine which parent is exercising more control than the other. He indicated that there was no need to investigate further, in light of the Stipulation and Order Amending Judgment executed by both petitioner and JC.

At hearing, petitioner testified in general terms that JC is unwilling to participate in these proceedings, as he does not wish to be responsible for child support for SC. JC did not appear at hearing, and all statements ascribed to him by the respondent's representative and petitioner constitute uncorroborated hearsay. I cannot base a decision solely upon these reported statements because they are hearsay. The rules of evidence generally do not apply to administrative hearings. Wis. Stat. § 227.45. Nevertheless, administrative decisions cannot be based solely upon uncorroborated hearsay. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987). Our state supreme court reinforced this principle in *Gehin v. Wisconsin Group Insurance Board*, 2005 WI 16, a decision that overturned a finding based upon untestified to medical records that were contradicted by petitioner's sworn testimony. The court's rationale is that "the purpose of allowing the admission of hearsay evidence is to free administrative agencies from technical evidentiary rules, but at the same time this flexibility does not go so far as to justify administrative findings that are not based on evidence having rational probative force." *Id.* at ¶54.

With the parties seeming to agree that JC's cooperation in shedding light on the placement was unlikely, the respondent argued that petitioner could simply pursue a new court order identifying the current placement situation. The petitioner responded that she was informed that she could only change placement orders one time annually; the respondent noted that this was incorrect, and that the child support agency would only assist her with that one time annually, but she was free to pursue that on her own more than one time annually.

Petitioner credibly testified that she and JC have continued SC's placement schedule as follows: petitioner has placement Tuesday through Friday and part of Saturday, and JC has placement part of Saturday through Monday. She noted that she remains the primary contact person for SC's school and her medical care. The respondent confirmed that JC does not have an open FS case.

In this case, the respondent has presented a prima facie case establishing that it properly removed SC from petitioner's FS household based upon a court document providing JC with primary placement of SC effective November 1, 2021. The petitioner has attempted to rebut that determination, but the record contains only uncorroborated testimony of petitioner to that effect. While I found petitioner's testimony to be credible and reasonable, it was not supported by any evidence or corroborating testimony from SC's school, SC's doctor, or any other individuals who may have knowledge of SC's present placement situation. The burden is on petitioner to now demonstrate that she is the primary provider for SC. Based

upon the record before me, she has not substantively rebutted the agency's assertion that it correctly removed SC from her FS household.

I note to petitioner that nothing precludes her from again requesting that SC be added to her FS case, and she would be advised to pursue a court order to establish her assertion that she retains primary physical placement, or obtain a statement from JC in that regard.

CONCLUSIONS OF LAW

The agency correctly determined that SC should not be counted in her FS food assistance group because SC's primary placement was assigned to her father by court order.

THEREFORE, it is

ORDERED

That the petition for review is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5th Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

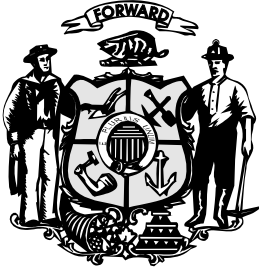
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 28th day of February, 2022



\s _____
Peter McCombs
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 28, 2022.

Marinette County Department of Human Services
Division of Health Care Access and Accountability